APPEAL NO: 06-19-00068-CV

In the Court of Appeals for the Sixth District of Texas

Michael Kennedy, TDCJ #01516203
PLAINTIFF-APPELLANT,

v.

Kaycee Jones, et al.,
DEFENDANTS-APPELLEES.

ON APPEAL FROM THE 258TH JUDICIAL DISTRICT COURT OF POLK COUNTY, TEXAS

BRIEF OF APPELLEES

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ORAL ARGUMENT NOT REQUESTED

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IDENTITY OF PARTIES AND COUNSEL

The undersigned counsel of record certifies that the following listed persons and entities as described in Rule 38.1(a) of the Texas Rules of Appellate Procedure have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

A. Parties:

Defendants-Appellees: Chief Justice Nathan L. Hecht
Justice Paul W. Green
Justice Eva Guzman
Justice Debra Lehrmann
Justice Jeffrey S. Boyd
Justice John Phillip Devine
Justice Jeff Brown
Justice Jimmy Blacklock
Justice J. Brett Busby

Justice Leanne Johnson
Justice Hollis Horton
Chief Justice Steve McKeithen
Justice Charles Kreger
Judge Kaycee Jones

Plaintiff-Appellant: Michael Kennedy
Plaintiff pro se

B. Attorneys

For Appellees: Courtney Corbello
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For Appellant: *Pro se*

/s/ Courtney Corbello
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STATEMENT OF THE CASE

On March 3, 2019, Michael Kennedy filed his Original Petition. Clerk's Record (C.R.) at 6. Kennedy sued Appellees on the Texas Supreme Court - Chief Justice Nathan L. Hecht, Justice Paul W. Green, Justice Eva Guzman, Justice Debra Lehrmann, Justice Jeffrey S. Boyd, Justice John Phillip Devine, Justice Jeff Brown, Justice Jimmy Blacklock, Justice J. Brett Busby – and Ninth Court of Appeals-Justice Leanne Johnson, Justice Hollis Horton, Chief Justice Steve McKeithen, Justice Charles Kreger – as well as Polk County Judge Kaycee Jones, the Texas Attorney General, and the State of Texas for violations of 42 U.S.C. § 1983, Tex Const. Art 1, Sec. 11, 12, 13, 19, and "Tex. Civ. Prac. Rem. Code 1901 through 2007." *Id.*

Appellees answered Kennedy's complaint and moved to declare him a vexatious litigant on May 6-7, 2019. C.R. 58-72. The vexatious litigant motion was later amended to include exhibits. C.R. at 87-132. After a hearing on Appellees' motion on June 7, 2019, the trial court granted Appellees motion and signed two orders. The first was an order that Kennedy was a vexatious litigant and was required to furnish security in the amount of $5,000 in order to proceed in his case against Appellees. C.R. at 144. The second was a prefiling order stating that Kennedy had been declared vexatious and was, therefore, barred from filing any new litigation in

the State of Texas without first obtaining permission of a local administrative judge. C.R. at 145-46. Kennedy has appealed both orders. C.R. at 180.

ISSUES PRESENTED FOR REVIEW

Issue 1: Whether this Court lacks jurisdiction to hear Kennedy's appeal of the trial court's order under Section 11.051 declaring him vexatious and ordering him to furnish security.

Issue 2: Whether the trial court abused its discretion in declaring Kennedy to be a vexatious litigant pursuant to Section 11.101.

Issue 3: Whether this Court lacks jurisdiction over Kennedy's remaining arguments.

SUMMARY OF THE ARGUMENT

This Court should affirm the trial court's order under Section 11.051 and order under Section 11.101. This Court does not have jurisdiction to hear Kennedy's appeal of the Court's order under Section 11.051 because such an order is neither a final judgment nor an appealable interlocutory order. As to the trial court's order under Section 11.101, this Court should find the trial court exercised sound discretion in declaring Kennedy a vexatious litigant given that he has well over 100 cases determined adversely to him and he is unlikely to prevail in his claims against Appellees. Finally, this Court lacks jurisdiction to hear Kennedy's remaining

arguments raised in his Appellant's brief as none fall within the scope of the orders Kennedy has appealed.

STANDARD OF REVIEW

An appellate court should review a trial court's declaration of a vexatious litigant under an abuse-of-discretion standard. *In re Douglas*, 333 S.W.3d 273, 282–83 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); *Douglas v. Am. Title Co.*, 196 S.W.3d 876, 879 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also* TEX. CIV. PRAC. & REM. CODE §§ 11.054–.056. The test for an abuse of discretion is whether the court acted arbitrarily or unreasonably and without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985); *Smithson v. Cessna Aircraft Co.*, 665 S.W.2d 439, 443 (Tex. 1984); *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124, 126 (Tex. 1939).

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER KENNEDY'S APPEAL OF THE TRIAL COURT'S ORDER UNDER SECTION 11.051 THAT KENNEDY FURNISH $5,000 IN SECURITY PRIOR TO PROCEEDING IN THE PRESENT CASE.

This Court does not have jurisdiction to consider any appeal by Kennedy of the order that he furnish $5,000 in security to proceed in this case. Generally, only final decisions of trial courts are appealable. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001); *see* TEX. CIV. PRAC. & REM. CODE § 51.012 (final

judgment of district and county courts). Some appeals from particular types of interlocutory orders have also been authorized by the Legislature. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 51.014. Therefore, appeals can generally be taken only from final judgments and appealable interlocutory orders. *Lehmann*, 39 S.W.3d at 195. Generally, if an order is not either a final judgment, or one from which the Legislature has authorized appeal, this Court has no authority to review the court's ruling. *Id.*

There are two types of relief orders that may be issued related to a vexatious litigant motion. The first is available under Section 11.051 and provides that a defendant may, within ninety days of filing an original answer, seek an order determining the plaintiff to be a vexatious litigant and requiring him to furnish security. The second order may be issued under Section 11.101, which allows a court (on the motion of a party or on its own motion), upon finding a person to be a vexatious litigant, to prohibit that person from filing new litigation. While this Court has held that orders under Section 11.101 can be immediately appealable as interlocutory orders, there is no authority to suggest an order under Section 11.051 threatening to dismiss Kennedy's claims unless he furnishes security is final or appealable. *See Aguilar v. Morales*, 04-16-00382-CV, 2017 WL 4158090, at *5 (Tex. App.—San Antonio Sept. 20, 2017, no pet.) (order declaring Anthony Aguilar a

vexatious litigant, which threatened to dismiss Anthony Aguilar's claims against Morales if Anthony Aguilar did not pay security on or before June 21, 2016 "is more like a prelude than a finale.'"); *see also Almanza v. Keller*, 345 S.W.3d 442, 443 (Tex. App.–Waco 2011, no pet.) ("[T]here is no statutory right of an interlocutory appeal of a vexatious litigant order or the related order requiring security."); *cf. Douglas v. Am. Title Co.*, 196 S.W.3d 876, 877 (Tex. App.–Houston [1st Dist.] 2006, no pet.) (addressing on appeal trial court's order declaring appellant vexatious litigant only after he failed to furnish court-ordered security and his lawsuit was dismissed).

It is not clear from Kennedy's brief whether he is appealing the Court's order under Section 11.051 or Section 11.101. To the extent it is the former, this Court does not have jurisdiction to hear his appeal given than there is no final judgment in this case.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLARING KENNEDY TO BE A VEXATIOUS LITIGANT PURSUANT TO SECTION 11.101.

Chapter 11 of the Texas Civil Practice & Remedies Code permits a court, on the motion of a party or on its own motion, to declare a litigant to be vexatious. There are two criteria. First, the court must find that there is no reasonable likelihood that the plaintiff will succeed on his claims against the defendants. TEX. CIV. PRAC. & REM. CODE § 11.054. Second, the court must find that, in the past seven years, the

plaintiff has commenced at least five lawsuits that were dismissed as frivolous or groundless, or that were determined adversely to the plaintiff. *Id.* at § 11.054(1).

On appeal, Kennedy does not make any colorable argument regarding the Court's order that he be declared vexatious. *See Appellant's Brief generally*; *see also* TEX. CIV. PRAC. & REM. CODE § 11.054(1)(C). That issue, therefore, is waived on appeal. The failure to adequately brief an issue, either by failing to specifically argue and analyze one's position or to provide authorities and record citations, waives any error on appeal. See TEX. R. APP. P. 38.1(h) (brief must contain clear and concise argument for contentions with appropriate citations to authorities and record); *Wolfe v. C.S.P.H., Inc.*, 24 S.W.3d 641, 646-47 (Tex. App.—Dallas 2000, no pet.) (appellant waives issues if he fails to support contentions with appropriate authority).

Even if this Court finds Kennedy has not waived this issue, it should affirm the trial court's ruling under Section 11.101. The trial court considered Kennedy's substantial litigious history and found that in the past seven years, Kennedy had commenced at least five lawsuits that were dismissed as frivolous. TEX. CIV. PRAC. & REM. CODE § 11.054(1); C.R. at 68-69 (indicating well over *100 cases* have been determined adversely to Kennedy); C.R. at 144. Evidence of Kennedy's previous

frivolous lawsuits, in the form of final judgments and appellate opinions, were filed with the trial court, and thus support such a finding. C.R. at 98-132.

The trial court also did not abuse its discretion in finding that Kennedy had no reasonable likelihood of success on any of his claims. Kennedy's first cause of action is an attempt to attack Appellees' rulings made within their judicial jurisdictions, therefore, Appellees are entitled to judicial immunity. C.R. at 9-11, 13-19; *Mireles v. Waco*, 502 U.S. 9, 11–12 (1991). Kennedy's second cause of action – seeking injunctive relief as a post-conviction remedy – is nonactionable because the trial court has no jurisdiction over such a claim. C.R. at 20-22; *Ater v. Eighth Court of Appeals*, 802 S.W.2d 241, 243 (Tex. Crim. App. 1991) ("We are the only court with jurisdiction in final post-conviction felony proceedings.").

Because there is no basis to find the trial court abused its discretion in issuing a prefiling order against Kennedy, this Court should affirm the ruling.

III. This Court Lacks Jurisdiction Over Kennedy's Remaining Arguments.

Kennedy makes several other arguments in his Appellant's brief to include: (1) the failure to provide him 10 days in which to respond to "Defendants' pleadings;"[1] (2) the denial of Kennedy's due process rights on the basis that visiting

[1] The record clearly shows that Kennedy was given much more than 10 days to respond to Appellees' vexatious litigant motion. The motion was filed over a month before the hearing and was only amended on June 3, 2019 to include exhibits that corresponded with cases cited to in the

Judge Countiss did not "announce his name of a retired judge" or "take [the] oath required by Texas Constitution Article XVI;" (3) errors that occurs during the trial on his criminal conviction; and (4) that this Court lacks jurisdiction to hear his appeal because there is no final order of dismissal. Kennedy did not appeal or preserve any of the first three issues but has only sought review from this Court of the orders declaring him vexatious. As to the last argument, Appellees agree this Court lacks jurisdiction over portions of Kennedy's appeal for the reasons stated in Section I above.

PRAYER

In light of the foregoing, Appellees respectfully asks this Court to affirm the trial court's order declaring Kennedy a vexatious litigant. Appellees further request that this court decline to exercise jurisdiction over the remaining arguments in Kennedy's appeal.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

original motion in support of Appellees' argument under TEX. CIV. PRAC. & REM. CODE § 11.054(1). C.R. at 62; C.R. at 87. Also, Kennedy *did* respond to Appellees' motion. C.R. at 141.

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ATTORNEYS FOR APPELLEES

NOTICE OF FILING

I, COURTNEY CORBELLO, Assistant General of Texas, certify that I have electronically submitted for filing, a true and correct copy of the above and foregoing **Appellees' Brief** in accordance with the Electronic Case Files System of the Sixth Court of Appeals, on December 9, 2019.

/s/ *Courtney Corbello*
COURTNEY CORBELLO
Assistant Attorney General

CERTIFICATE OF SERVICE

I, COURTNEY CORBELLO, Assistant Attorney General of Texas, certify that a true and correct copy of the above and foregoing **Appellees' Brief** has been served by placing same in the United States Mail on December 9, 2019, addressed to:

Michael Allyn Kennedy, TDCJ #00516203
Polunsky Unit
3872 FM 350 South
Livingston, Texas 77351

/s/ *Courtney Corbello*
COURTNEY CORBELLO
Assistant Attorney General

RULE 9.4(I) CERTIFICATE OF COMPLIANCE

I certify that this computer-generated document, accounting for Rule 9.4(i)(1)'s inclusions and exclusions, is 1,802 words, as calculated by Microsoft Word 2016, the computer program used to prepare this document.

/s/ *Courtney Corbello*
COURTNEY CORBELLO
Assistant Attorney General